80-906

No.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1980

DAMASCUS COMMUNITY CHURCH,

Appellant

v.

CLACKAMAS COUNTY, a Political Subdivision of the State of Oregon,

Appellee

On Appeal From the Court of Appeals of the State of Oregon

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. May a zoning ordinance, without violation of the Free Exercise Clause of the First Amendment, prohibit a church from operating a school which has been factually determined to be "an integral and inseparable part of the Church" where there is lacking any record evidence showing a compelling state interest in that prohibition?

2. Where a church-school has been factually determined to be "an integral and inseparable part" of its church, may a zoning ordinance, without breach of the Equal Protection Clause of the Fourteenth Amendment, separate church from school by placing the school in a class of uses for which the ordinance requires more burdensome conditions than for a church?

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OPINIONS BELOW

The 1980 opinion of the Court of Appeals of the State of Oregon, which appears as Appendix A hereto, is reported at 45 Or. App. 1065 and 610 P. 2d 273 (1980). The 1978 opinion of the Court of Appeals of the State of Oregon, which appears as Appendix B hereto, is reported at 32 Or. App. 3 and 573 P. 2d 726 (1978). The 1979 opinion of the Circuit Court of Clackamas County, which appears as Appendix C hereto, was issued in the form of a letter and is not reported.

JURISDICTION

This case was decided by the Oregon Court of Appeals on April 28, 1980. The Supreme Court of Oregon denied review of that decision on September 3, 1980. The Oregon Court of Appeals then entered judgment on September 11, 1980. The notice of appeal was filed with the Oregon Court of Appeals on December 1, 1980. The jurisdiction of this Court invoked under Title 28 of the United States Code § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

U. S. Constitution, Amendment XIV, Section 1:

> ". . . nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

Clackamas County [Oregon] Zoning Ordinance, §§ 8.1, 8.4, 8.8, and 8.12.

The relevant portions of the Ordinance appear as Appendix K.

STATEMENT OF THE CASE

The Clackamas County [Oregon] Zoning Ordinance, adopted in 1966 (see relevant portions appended hereto as Appendix K) provides that permits may be granted for use of land for a "church" under certain conditions. It contains separate provisions for the use of land for a "parochial school", and these conditions are more restrictive than for a "church". Neither "church" nor "parochial school" is defined in the ordinance.

In 1967 the appellant, Damascus Community Church, a body of fundamentalist Christian believers, applied for and was granted a conditional use permit under the "church" provision of the Ordinance to construct a church on property zoned for residential uses. The Church, in 1967, was conducting kindergarten schooling on its premises as an integral part of its religious mission, expanding this to embrace eight grades of elementary schooling by 1975. Eight years after the Church had initiated its school program, the County of Clackamas Planning Department, on November 17, 1975, notified the Church that it must either cease operation of that program or obtain a conditional use permit to operate a "parochial school". The Church then applied for the permit but was denied it. That denial was ultimately upheld on January 16, 1978, by the Oregon Court of Appeals which found that the evidence presented by both sides was such that reasonable persons might differ as to the effect of the proposed use on the surrounding neighborhood; hence, under Oregon precedents, the applicant Church would be considered to have failed to carry its special burden of proof that the proposed use would not adversely affect the surrounding neighborhood. (App. B, p. A19). That court declined to reach the Church's contention that its school program "is an integral part of church facilities and thus is covered by the original con-

ditional use permit issued to the church in 1967." (App. B, p. A20).

Following the filing of a suit thereafter by Clackamas County to enjoin, as a nuisance, the operation of the school, on October 11, 1978, the Church brought the present action in the Circuit Court of that county for injunctive relief and for a declaratory judgment that (a) the 1967 conditional use permit for a "church" was "sufficient to encompass its school operation", (b) that, alternatively, if the school were not deemed within the term, "church", and the Zoning Ordinance were thus applied to prohibit the Church to operate its school, that application would be violative of the Church's rights protected by the Free Exercise Clause of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. At the trial the Church presented extensive evidence establishing the nature of its school as inherently a ministry of the Church (Transcript of Proceedings before Circuit Court, January 18, 1979, 39-40) and showing the substantial harm which would result to that ministry were it to be shut down as the result of forcing it to be classified as a "parochial school". The County, however, did no more than ask the court to defer to the wisdom of the County in having created the Ordinance, and it presented no evidence to show a compelling state interest in the imposing of that classification. On June 29, 1979, the Circuit Court made the finding of fact that the school

> ". . . is an integral and inseparable part of the . . . Church . . ." (App. C, p. A26).

The court then stated, as a conclusion of law

> ". . . that [the Church's] original and current conditional use permit is sufficient to encompass its school operation." (App. C, p. A26).

The Oregon Court of Appeals reversed on the ground that the Zoning Ordinance, by its terms, contained separate provisions for "churches" and for "parochial schools", the minimum conditions for which uses differ. (App. A, p. A7). Thus, said the court:

> ". . . it is clear that full-time parochial schools are *not* among the uses which could be regarded as implicit in a conditional use permit for a church under this ordinance." (App. A, p. A6).

On the foregoing ground the court rejected the Church's argument that "the ordinance interferes with its right to the free exercise of religion". (App. A, p. A8). The court did not comment upon the fact that neither "churches" nor "parochial schools" are defined in the Ordinance or upon whether the imposed classification, excluding the Church's operation of its educational ministry from the Ordinance's term, "churches", was justified by a compelling state interest. Nor did the court pass upon the other constitutional issues raised by the Church. The court further stated that it did not consider the County's nuisance action in this appeal.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

As land use regulation grows in the United States,[1] its content and application to religious institutions and religious activities becomes of increasing significance. Simultaneously the nation has witnessed a spectacular growth in schools such as that of Damascus Community Church,[2] arising from the manifest need of more churches to carry out a pervasively religious mission in education. The issues in the present case have never received plenary review in this Court and are highly significant in relation to these parallel developments.

1. The court below failed to apply the test required by this Court in its recent religious liberty decisions—particularly those from *Sherbert v. Verner*, 374 U. S. 398 (1968) forward. Under *Sherbert*, the finding of a compelling state interest is requisite to the sustaining of any form of governmental regulation which impinges on the free exercise of religion. In the present case the record establishes, absolutely, (a) that the Church's school is an "integral and inseparable part of the Church".[3] (Transcript, 21-22, 34, 39), (b) that the Zoning Ordinance as construed by the court below, bars the operation of the school and hence substantially infringes upon the Church's religious liberty. That it may do, if justified by

1. *Developments in the Law—Zoning*, 91 HARV. L. REV. 1429 (1978).

2. V. D. Nordin and W. L. Turner, "*More than Segregation Academies: The Growing Protestant Fundamentalist Schools*", PHI DELTA KAPPAN, February, 1980 (reprinted at 126 CONGRESSIONAL RECORD, E 2583 *et seq.*, May 22, 1980).

3. The Church's school is indistinguishable, in constitutionally significant characteristics, from the schools examined by this Court in *Lemon v. Kurtzman*, 403 U. S. 602 (1971).

a compelling state interest. That it may not do, if no compelling state interest has been proved. Whatever may have been the essential rationale in 1949 in *Corporation of Presiding Bishop v. City of Porterville,* 90 Cal. App. 2d 656, 203 P. 2d 82 (Cal. Dist. Ct. of Appeals, 1949), *appeal dismissed,* 338 U. S. 805 (1949), this Court's subsequent Free Exercise decisions leave no possibility for the proposition that, in the singular area of zoning, no compelling state interest need be proved however great an invasion of religious liberty would be caused by a zoning ordinance.

Plainly, since this Court's decisions in *Sherbert* and in *Wisconsin v. Yoder,* 406 U. S. 205 (1972), the application of the traditional test of due process constitutionality in zoning cases—the finding of a mere "substantial relation to public health, safety, morals, or general welfare" [4]—is insufficient where Free Exercise rights are (as here) the subject of severely restrictive regulation.[5] This Court has recently stated that where a housing ordinance creates an "intrusive regulation of the family"—even though not, as here, regulation of a "preferred" First Amendment freedom —"the usual deference to the legislature is inappropriate" and the Court "must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation." *Moore v. East Cleveland,* 431 U. S. 494, 499 (1977).

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4. *Euclid v. Ambler Realty Co.,* 272 U. S. 365, 395 (1926).

5. "But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern the case." *West Virginia State Board of Education v. Barnette,* 319 U. S. 624, 639 (1943).

2. The court below has failed to observe principles established by the Supreme Court under the Equal Protection Clause. Certain classifications by government are "suspect" classifications and must therefore be subjected to "strict scrutiny" in order to determine whether they fulfill a "compelling" need of government. *Police Department of Chicago v. Mosely,* 408 U. S. 92 (1972). Religious classifications are certainly "suspect" classifications. Here, without any requisite showing that a "compelling" need is thereby served, the Zoning Ordinance separates Damascus Community Church from its school—judicially determined to be "integral and inseparable" from the Church—by placing the school in a class of uses for which the Ordinance makes more burdensome requirements. The Ordinance in this respect is directly violative of the Equal Protection Clause.

CONCLUSION

For all of the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

IN THE
COURT OF APPEALS OF THE STATE OF OREGON

No. 78-10-182 CA 15205

Damascus Community Church,

Respondent,

v.

Clackamas County, a political subdivision of the State of Oregon,

Appellant.

Appeal from Circuit Court, Clackamas County.

Charles A. Sams, Judge.

Argued and submitted March 28, 1980.

Beth Blount, Assistant County Counsel, Oregon City, argued the cause for appellant. With her on the briefs was John E. Schwab, Clackamas County Counsel, Oregon City.

B. Rupert Koblegarde, Portland, argued the cause for respondent. With him on the brief were Andrew J. Gerlicher and Richard L. Lonergan, Portland.

Before Richardson, Presiding Judge, and Thornton and Buttler, Judges.

BUTTLER, J.

Reversed.

BUTTLER, J.

In 1967, the defendant county issued a conditional use permit to the plaintiff in this declaratory judgment proceed-

ing, authorizing plaintiff to construct and operate a church in an RA-1 (Rural (Agricultural) Single Family Residential) zone. In 1975, the county became aware that plaintiff was operating a full-time parochial school on the church premises. The county planning director notified plaintiff that the school operation was a violation of the Clackamas County zoning ordinance and demanded that the school use be discontinued. Thereafter, plaintiff applied for a conditional use permit to operate the school, and the application was denied by the county. The county's denial was affirmed by the circuit court and by this court. *Damascus Comm. Church v. Clackamas Co.*, 32 Or App 3, 573 P2d 726, *rev den* 283 Or 99 (1978).

The county then brought suit to enjoin the operation of the school. Plaintiff, in turn, brought this declaratory judgment suit, seeking, first, a declaration that the 1967 conditional use permit for the church was "sufficient to encompass its school operation"; second, a declaration that, if the zoning ordinance prohibits the operation of the school, the ordinance as applied to plaintiff violates plaintiff's right to the free exercise of religion under the United States and Oregon Constitutions; and, third, an injunction against the county's enforcement of the ordinance against plaintiff. The trial court concluded that the school

> "is an integral and inseparable part of the ° ° ° Church and ° ° ° that [Plaintiff's] original and current conditional use permit is sufficient to encompass its school operation."

The county appeals, and we reverse.[1]

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1. Although plaintiff's declaratory judgment suit and the county's injunction suit were consolidated for trial, the court's judgment order appears to decide only the plaintiff's suit. We therefore do not consider the injunction suit or the relief the county sought through it in this appeal.

The relevant portions of the Clackamas County Zoning Ordinance provide:

"CONDITIONAL USES

"8.1 GENERAL PROVISIONS

"A. . . . . The following conditional uses, because of their public convenience and necessity and their effect upon the neighborhood shall be permitted only upon the approval of the Hearings Officer after due notice and public hearing, ° ° ° and a finding that such conditional use will not be detrimental to the general comprehensive plan and surrounding property.

"B. . . . . Permits for conditional uses shall stipulate restrictions or conditions which may include a definite time limit, provisions for a front, side or rear yard greater than the minimum dimensional standards of the Zoning Ordinance, suitable landscaping, off-street parking, and any other reasonable restriction, condition, or safeguard that would uphold the spirit and intent of the Zoning Ordinance, and mitigate any adverse effect upon the neighborhood properties by reason of the use, extension, construction or alteration allowed.

"C. . . . . Any conditional use shall meet the dimensional standards of the Zone in which it is to be located, as well as the minimum conditions listed below.

"° ° ° ° °

"8.4 CHURCHES

"A. . . . . District Permitted: Residential, Multi-Family, Agricultural, and Commercial Districts.

"B. . . . Conditional Standards.

"* * * * *

"C. . . . Off-street Parking: As provided in Section 7.1.

"* * * * *

"8.8 SCHOOLS: PAROCHIAL AND PRIVATE

"A. . . . . District Permitted: Agricultural, Residential, and Multi-Family Districts.

"B. . . . . Dimensional Standards:

"* * * * *

"C. . . . . Off-Street Parking: As required in Section 7.1.

"D. . . . . Off-Street Loading and Unloading Area for Buses: As required in Section 7.2.

"8.12 PUBLIC SCHOOLS: PRIVATE AND PAROCHIAL SCHOOLS OFFERING CURRICULA SIMILAR TO PUBLIC SCHOOLS.

"A. . . . . District Permitted: Single-family Residential, Agricultural, and the MR-1 Multi-Family District.

"B. . . . . Dimensional Standards:

"* * * * *

"C. . . . . Off-Street Parking: As required in Section 7.1.

"D. . . . Off-Street Loading and Unloading Area for Buses: As required in Section 7.2."

The issues in this case are, first, whether plaintiff's 1967 conditional use permit for the operation of the church also authorizes the operation of the parochial school; and, second, whether the zoning ordinance denies

plaintiff's constitutional right to the free exercise of religion if the permit does not authorize the operation of the school.[2]

On the first issue, plaintiff relies on textual authority and on decisions from other jurisdictions holding that terms such as "church" and "religious use" in zoning ordinances implicitly include uses—in addition to worship and activities directly related to worship—which are ancillary or related to the religious purposes or the entity conducting the "church" or "religious use." *See* 2 Anderson, American Law of Zoning 2d, § 12.25 (1976); and Annotation, 62 ALR3d 197 (1975) (summarizing cases in which various uses have been held to be or not to be within the scope of such terms as "church," "religious use" and the like.) The principal case on which plaintiff relies, and the case which the trial judge in his letter opinion cited as the principal support for his decision, is *City of Concord v. New Testament Baptist Church*, 118 NH 56, 382 A2d 377 (1978). There, the New Hampshire Su-

2. The parties also raise the issue of whether the declaratory judgment proceeding was at law or in equity. Plaintiff argues that this was a legal proceeding, and that this court therefore cannot disturb the trial court's "factual determination that the school is an integral and inseparable part of the church," which plaintiff argues was supported by substantial evidence. Whatever our scope of review, we agree with the trial court's finding—if such it was—that the precepts of plaintiff and its members require education for children to be conducted in a nonsecular setting under the auspices of plaintiff. However, we do not agree that that fact, in itself, is determinative of whether, *under the ordinance*, a conditional use permit for the operation of a church automatically carries with it authority to operate a parochial school. Because we consider the relevant question to be the meaning of the ordinance—a question of law—it is immaterial whether our review of factual questions is for substantial evidence or de novo. *Cf. Anderson v. Peden*, 284 Or 313, 315, 587 P2d 59 (1978).

preme Court concluded that a parochial school was a facility "usually connected with a church," and was therefore a permitted use under a city ordinance authorizing the operation of churches and "facilities usually connected with a church" in the area in question. The court stated:

> "° ° ° The question of what facilities are 'usually' connected or associated with a church could be considered from the viewpoint of the specific church, of churches generally, or of the city. The problem with the latter view is that it involves governmental determination of propriety in religious matters and thus could infringe on the free exercise of religion ° ° °."
>
> 118 NH at 58, 382 A2d at 379.

The court then summarily reviewed the historical background of religious educational facilities in New England and in Pennsylvania, and concluded:

> "° ° ° While every church may not 'usually' have a full-time school associated with it, we hold that the Heritage Christian School is a proper permitted use connected with, and is a part of, the New Testament Baptist Church." 118 NH at 60, 382 A2d at 380.

The *City of Concord* case is not analogous to the present one. Unlike the ordinance considered by the New Hampshire court, the county's ordinance here does not refer to "facilities usually connected with a church." It may be that *certain types* of ancillary uses "usually connected with a church" *are implicitly* encompassed by conditional use permits for churches issued under the county ordinance, notwithstanding the absence of language in the ordinance so providing. However, we need not decide that question here, because it is clear that full-time parochial schools are *not* among the uses which could be regarded as implicit in a conditional use permit for a

church under this ordinance. The section of the ordinance governing conditional uses treats churches under one subsection and parochial and private schools under other subsections. The minimum conditions for the church use and for the school use differ. Thus, the ordinance clearly manifests the county's legislative decision to make the granting of and criteria for conditional use permits for churches and for parochial schools different and independent. We accordingly conclude that, under the ordinance, a conditional use permit for a church does not automatically authorize the operation of a full-time parochial school.[3]

In addition to the fact that the county zoning ordinance differs in relevant respects from the ordinance con-

3. Plaintiff also argues that the conditional use permit application filed by it in 1967 included a notation describing the proposed structures as "frame church and educational units." Plaintiff's apparent point is that, whether or not a school use is necessarily part of a conditional church use under the terms of the ordinance, the county *in fact* approved the school use as well as the church use by approving an application which contained the notation with the words "educational units." However, that notation did not appear on all copies of the application. The notation was in a different handwriting from that on the remainder of the application, and the copies were made with attached carbon sheets. The record does not answer whether the copy of the application which was forwarded to the planning commission contained the notation, nor did the trial court make a finding on the question. We note, however, that the copy on which planning commission approval is endorsed does not contain the notation. In any event, even had the notation appeared on the copy which was forwarded to the planning commission, that would not support plaintiff's thesis that the commission therefore intended to approve a parochial school use. The county concedes that the use of the church building for the conduct of Sunday School classes, as distinguished from the daily parochial school use, is within the scope of the conditional use permit for the church. The words "educational units" therefore do not *necessarily* imply a *parochial* school use.

sidered in *City of Concord,* we also find *City of Concord* and the other authority upon which plaintiff relies to be unpersuasive for another reason. The court in *City of Concord* took the view that the determination of what constitutes a connected or usual church use was inherently flexible and was to be made case by case on the basis of the religious tenets of the particular entity operating the church. The New Hampshire court also suggested—and plaintiff argues here—that constitutional and other values would be impaired if public authorities were able to define the parameters of religious activity. The ordinance in the New Hampshire case required that kind of determination; the ordinance involved here does not. For that reason, the thesis, inherent in the New Hampshire court's comments, that the definition of a church or religious use in a zoning ordinance is presumptively a regulation of religious activity rather than a regulation of the use of land, is inapplicable here.

For essentially the reasons expressed in the preceding paragraph, we reject plaintiff's argument that the ordinance interferes with its right to the free exercise of religion. We stated in *Christian Retreat Center v. Comm. for Wash. Co.,* 28 Or. App. 673, 560 P2d 1100, *rev. den.* (1977):

> "° ° ° In *Jehovah's Witnesses v. Mullen et al,* 214 Or 281, 330 P2d 5, 74 ALR2d 347 (1958), *appeal dismissed* 359 US 436 (1959), the city council of the city of Milwaukie relied upon a substantially similar provision of its zoning ordinance in denying an application for a 'special use'—i.e., conditional use—permit to construct a church in a primarily single-family residential zone where it had determined that the use of the land involved as the site for a church would result in a level of 'traffic congestion' which would be incompatible with the nature of the

surrounding area. In upholding that decision against the charge that it constituted a denial of the freedom of religion guaranteed by the First and Fourteenth Amendments to the United States Constitution and Art I, § 2 of the Oregon Constitution, the court pointed out the distinction between the infringement upon religious *beliefs*, which is absolutely prohibited, and the permissible imposition of reasonable limitations, designed to protect the public health or welfare, upon religious *practices*. (Footnote omitted.) Like the ordinance upheld in *Jehovah's Witnesses*, those provisions of the Washington County Community Development Ordinance which in effect authorize the denial of a "church and accessory use" permit where the granting of the application would not best serve the 'probable need of the public' represent a reasonable limitation upon religious practices; the board did not, therefore, 'misconstrue the applicable law' when it concluded that the ordinance did not, by authorizing the denial of plaintiff's application, constitute an unreasonable restraint upon the freedom of religion." 28 Or App at 680-81. (Emphasis in original.)

The county ordinance is clearly intended as land use regulation, and it permits both churches and parochial schools, but not necessarily on the same site if the requirements are not met. There is no contention that the county, as a matter of practice, has not permitted parochial schools or has discriminated in favor of, or against, any school sponsored by any particular sect. A full-time school is a more intensive use than a church, and there is no constitutional prohibition against the county's adopting different requirements for the two uses.

Reversed.

APPENDIX B

IN THE
COURT OF APPEALS OF THE STATE OF OREGON

No. 96891
CA 7349

Damascus Community Church,

Appellant,

v.

Clackamas County Board of Commissioners,

Respondents.

(Filed Jan. 16, 1978)

° ° °

Appeal from Circuit Court, Clackamas County.

Howard J. Blanding, Judge.

Argued and submitted August 23, 1977.

William B. Ball, Harrisburg, Pennsylvania, argued the cause for appellant. With him on the briefs were B. Rupert Koblegarde and Grethe A. Larson, Portland.

Keith Kinsman, Assistant County Counsel, Oregon City, argued the cause and filed the brief for respondents.

Gregory R. Mowe, American Civil Liberties Union of Oregon, Portland, filed a brief amicus curiae for Damascus Community Church.

Before Schwab, Chief Judge, and Richardson and Johnson, Judges.

SCHWAB, *C.J.*

Affirmed.

JOHNSON, *J.*, dissenting opinion.

SCHWAB, *C.J.*

This is a writ of review proceeding wherein petitioner contests the denial of a conditional use permit to operate a parochial school. Petitioner presently has a church on a six-acre site in a rural residential area of Clackamas County. A conditional use permit to operate a church was issued by the county in 1967. Since 1966, the church has also been operating a kindergarten and school for children in grades 1 through 12. The school is conducted in existing church facilities and presently has an enrollment of 102 students with five full-time faculty. In 1975, the Clackamas County Planning Department advised petitioner that its conditional use permit pertained only to the operation of a church. Petitioner then applied for the subject conditional use permit. The application contemplated continued use of the existing church facilities for the school with an eventual enrollment of 250 students and a faculty of 12.

The Clackamas County zoning ordinance provides in pertinent part:

> "A . . . The following conditional uses, because of their public convenience and necessity and their effect upon the neighborhood shall be permitted only upon the approval of the Planning Commission after due notice and public hearing * * * and a *finding that such conditional uses will not be detrimental to the general comprehensive plan and surrounding property.*
> " * * *
>
> "8.4 CHURCHES.
> " * * *
>
> "8.8 SCHOOLS: PAROCHIAL AND PRIVATE.
>
> "A . . . District Permitted: Agricultural, Residential, and Multi-Family Districts.

"B . . . Dimensional Standards:

"1 . . . Minimum land area: Twenty thousand (20,000) square feet.

"2 . . . Front yard setback, twenty-five (25) feet; Rear yard setback, twenty (20) feet; Side yard setback, twenty (20) feet.

"C . . . Off-Street Parking: As required in Section 7.1.

"D . . . Off-Street Loading and Unloading Area for Buses: As required in Section 7.2." (Emphasis supplied.)

Petitioner's application satisfied the specific requirements of paragraph 8.8. The Clackamas County Planning Commission denied the permit application. The Clackamas County Board of Commissioners affirmed the denial after conducting a public hearing, and made the following findings:

"1. The proposed use of the subject property as a school for pre-school, kindergarten and grades one through twelve, with an ultimate enrollment of 250 students, is in conflict with the Clackamas County Comprehensive Plan in that said Plan would require a minimum of 12½ usable acres for such a school.

"2. Applicant has failed to carry his burden of proving that the proposed use will not adversely affect the surrounding neighborhood, particularly with respect to traffic, noise and sewage disposal problems."

A petition for writ of review of the Clackamas County Board of Commissioners' denial was filed in circuit court. The court affirmed the denial of petitioner's conditional use permit. Petitioner appeals.

The petition for writ of review contended that

> " * * * [1] the finding by the Board of Commissioners was based upon an improper construction of the applicable law; this error was in construing the word 'Schools,' as used in the Comprehensive Plan * * * to include private as well as public schools, and [(2)] specifically that the Plaintiff's application for use of church facilities for a school which is an integral part of the church and not a separate entity falls within the requirements therein stated."

We cannot reach, in this appeal, petitioner's second contention that its proposed school is an integral part of church facilities and thus is covered by the original conditional use permit issued to the church in 1967. By applying for a conditional use permit for its school, the petitioner in effect concedes that, for the purpose of this proceeding, its proposed use was not permitted by the original permit. *See* Anderson v. Peden, 30 Or App 1063, 1067, 569 P2d 633 (1971).[1] However, petitioner's contention regarding the comprehensive plan can be reached.

The only provisions in the Clackamas County Comprehensive Plan dealing with the subject of schools provide:

> "The County's population has a direct effect upon school enrollment. At present, most schools in Clackamas County are keeping pace with the demand. There are a few situations where there is adequate

1. Our holding here does not prevent the church from contending, in an appropriate legal proceeding, that the school it seeks to operate falls within the purview of the original conditional use permit. Courts in several jurisdictions have broadly construed the definition of the word "church" as applied to zoning ordinances. *See* Synod of Chesapeake, Inc. v. City of Newark, 254 A2d 611 (Del. Ch. 1969); Corporation of Presiding Bishop, Inc. v. Ashton, 92 Ida. 571, 448 P2d 185 (1968); Annotation, 62 ALR3d 197, 206-12 (1975); Comment, *Judicial Definition of Religious Use in Zoning Cases,* 1973 Urban L. Ann. 291 (1973).

space for enrollment expansion, but there are many more in which the reserve capacity in the schools is expended, leaving no room for expansion without new buildings.

"In allocating land area for new school facilities, the Oregon State Board of Education has adopted general standards:

"Elementary School—any combination of grades one through eight. Five usable acres plus one usable acre for each 100 children, or fraction thereof, of ultimate building capacity.

"Junior High or High School—any combination of grades seven through twelve. Ten usable acres plus one usable acre for each 100 children, or fraction thereof, of ultimate building capacity.

"GOALS

"To insure adequate school sites for an expanding population.

"GENERAL POLICIES

"A school site task force should be appointed by the governing body to develop a school site study for future planning. This group should be composed of:

"A member of the School Board from each school district (or a selected citizen representative).

"A member of the School Administration from each district:

"Advisory to the group shall be:

"A member of the Planning Commission.

"Personnel from the Planning Staff as determined by the director.

"The task force should be led and coordinated by a staff member from the I.E.D. This group will serve as an avenue for exchange of information and ideas between the school districts and will contribute to coordinated planning of schools on a county-wide basis. It should also promote communication between the schools and the Planning Department to provide mutual assistance in directing the patterns of school growth.

"School sites should be located and purchased in advance of needs to obtain sites at minimum cost to the taxpayers.

"To encourage the location of schools in the urban area within walking distance for students, the maximum service area radius should be: Elementary school, one-half mile; Junior high, one mile; Senior high, one and one-half miles.

"An elementary school's service area should not be bisected by a major arterial street to reduce traffic hazards to small children.

"Junior and senior high schools should be located on, or near, an aterial street.

"Schools should be encouraged to use their facilities for multiple use, particularly in summer recreation programs.

"In large residential developments, school sites shall be dedicated and donated to the school districts. For smaller developments, an equitable financial contribution shall be made to the school district in proportion to the impact of the development on the school enrollment."

The county interprets the above-quoted provision as requiring a 12½-acre site for private parochial schools with a projected enrollment of 250 students. In Bienz v. City

of Dayton, 29 Or App 761, 566 P2d 904, *rev den* (1977), we held that where there is an ambiguity in a municipal ordinance, we defer to the municipality's interpretation if that interpretation is not contrary to the expressed terms of the ordinance. 29 Or App at 777. Here there is no ambiguity. Although the comprehensive plan speaks of "schools," it is apparent that the reference is to public schools only. The purpose of the plan provision is to prescribe a method for selecting sites for new public schools to meet expanding population needs by establishing a school-site task force. The task force consists of representatives of the Planning Commission, public school districts and the Intermediate Education District. Sites are to be purchased in advance of needs to minimize "the cost to taxpayers." In large residential developments, sites are to be dedicated "to the school district." In other developments there is to be an equitable contribution to the "school district." These provisions clearly have no relation to private schools. The undisputed testimony at the hearing was that the acreage standards set by the State Board of Education and referred to in the Comprehensive Plan apply only to public schools.

The county relies on Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772 (1975), in which the court held that where there is a conflict between a comprehensive plan and a zoning ordinance the plan prevails. Here, there is no conflict. The plan is silent on the subject of private schools. Where there is no conflict between the plan and a zoning ordinance, the ordinance governs. The proposed conditional use complies with the dimensional and other specific requirements relating to private and parochial schools set forth in the ordinance.

The County Board of Commissioners' conclusion in Factual Finding No. 1 that the proposed school is in conflict with the Comprehensive Plan is erroneous.

The petition for writ of review also contends that the Board of Commissioners

> " * * * did not have reliable, probative and substantial evidence to support their finding that the applicant failed to carry the burden of proving that the proposed use will not adversely affect the surrounding neighborhood."

At the hearing conducted by the Board, the evidence on issues other than compliance with the comprehensive plan concerned sewage disposal, traffic and noise. The petitioner first presented evidence regarding the effect that the proposed school would have on sewage disposal in the neighborhood. A number of neighborhood residents referred favorably to a report prepared by a soil scientist hired by the petitioner. The report stated that the church was currently operating at 48 percent of the capacity of its septic drain-field. One resident stated that the soil scientist had testified before the Clackamas County Planning Commission that the sewer system would not be detrimental to the community.

The evidence presented by the opponents of the conditional use permit regarding sewage disposal consisted of the testimony of several residents that there were a number of lots in the area of the church that were "dead lots" which had been denied septic tank permits and that many residents of the neighborhood were having problems with their septic tanks. In addition, one resident testified that the soil scientist who had written the sewage report for the petitioner had approved the septic tanks which were now the subject of complaints by neighborhood residents.

Next, the petitioner presented evidence regarding the effect that the proposed school would have on traffic in the neighborhood. One resident stated that a member of the county public works department testified before the

Clackamas County Planning Commission that there is currently no traffic problem created by the school's operation and none could be anticipated even with a doubling of the present traffic. Another resident stated that the traffic created by the school was light. The petitioner also introduced into evidence letters from neigborhood residents who could not attend the hearing who stated that traffic in the area of the church was heavier on Sunday than during the school week, and that the only traffic problem in the neighborhood was created by unsafe drivers.

The opponents' evidence in this area consisted of the testimony of two residents. One stated that a majority of the people who abutted the church property were opposed to the conditional use permit because of the increased traffic that would be produced by the school. Another resident stated that she often saw cars leaving the church being driven unsafely and that she had noticed a drastic reduction in traffic during the school's spring vacation.

Finally, the petitioner presented evidence regarding the effect that the proposed school would have on noise in the neighborhood. Two persons testified that the noise produced by the schildren currently at the school did not disturb them. In addition, one letter, written by two residents of the church neighborhood, introduced into evidence by the petitioner, stated that they were never bothered by the noise.

The opponents' evidence here consisted of the testimony of three neighborhood residents. They stated that their spouses worked at night and slept in the afternoon and were bothered by the noise of schoolchildren playing in the schoolyard.

We stated in Saxon v. Div. of State Lands, 31 Or App 511, 570 P.2d 1197 (1977), that

> "* * * [w]here the evidence before an agency is such that reasonable persons may fairly differ as to whether it establishes a fact in issue, there is substantial evidence to support the decision * * *." 31 Or App at 518, citing Dietz v. Smith, 28 Or App 871, 561 P2d 1032 (1977); Eastep v. Vet. Med. Exam. Bd., 22 Or App 457, 539 P2d 1144 (1975).

The sufficiency of the evidence on noise and traffic as distinguished from pollution is questionable. However, we need not reach that issue here because the petitioners, as their petition in effect concedes, had the burden of proof. *See* Anderson v. Peden, supra; Marracci v. City of Scappoose, 26 Or App 131, 135, 552 P2d 552, *rev den* (1976); Dickinson v. Bd. of County Comm., 21 Or App 98, 102, 533 P2d 1395 (1975).

Petitioner does not challenge the adequacy of the factual findings made by the Board. We note, however, that under the provisions of ORS 215.416(6) and (7) in Oregon Laws 1977, ch 654, § 2, p 15, which was not in effect at the time of the Board's decision here, the order would have been inadequate. That statute provides:

> "(6) Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance or other appropriate ordinance or regulation of the county and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole.
>
> "(7) Approval or denial of a permit shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justifica-

tion for the decision based on the criteria, standards and facts set forth."

If the petitioner elects to again apply for a conditional use permit for the operation of a school, the Board's order, whether it grants or denies the request, will need to be far more specific than the order at issue here.

Petitioner and amicus curiae argue in their briefs that the Board's denial of the conditional use permit deprived members of the church their constitutional right of free exercise of religion. The petition for writ of review, reproduced in pertient part above, does not raise this issue. In a writ of review proceeding, a court cannot consider any errors except those disclosed by the petition, Kinney v. City of Astoria, 58 Or 186, 189, 113 P 21 (1911); Fisher v. Union County, 43 Or 223, 233, 72 P 797 (1903); School District v. Irwin, 34 Or 431, 437-38, 56 P 413 (1899). Consequently, we do not consider the constitutional issue.[2]

The Board's denial of a conditional use permit to the church must stand.

Affirmed.

JOHNSON, *J.*, dissenting.

This case should be remanded. The Clackamas County Board of Commissioners' findings concerning sewage, traffic and noise are wholly inadequate and are not supported by substantial evidence.

The majority concedes that the findings are inadequate, but declines to reverse because there was no

2. A constitutional issue may be considered for the first time on appeal if there are compelling reasons to do so. *See* State ex rel. Juv. Dept. v. Patton, 5 Or. App. 450, 453, 485 P2d 653 (1971); City of Portland v. Trumbull Asphalt, 2 Or. App. 1, 5, 463 P2d 606, *rev. den.* (1970). We do not find any such compelling reasons in this case, especially in light of our decision in Christian Retreat Center v. Comm. for Wash. Co., 28 Or. App. 673, 560 P2d 1100, *rev. den.* (1977).

assignment of error challenging the adequacy of the findings. The problem with this rationale is that there is nothing in the record from which we can discern for purposes of judicial review what the Board's reasons were for concluding that petitioner "failed to carry his burden of proving that the proposed use will not adversely affect the surrounding neighborhood, particularly with respect to traffic, noise and sewage disposal problems." It may be that the Board was not persuaded by the evidence offered by petitioner, but there is nothing in the record to indicate that this was so or why. The only explanation offered by the county on appeal is that it relied on the "reliable, probative and substantial evidence" offered by the opponents concerning the traffic noise and sewage disposal. As the majority concedes, the opponents' evidence with respect to traffic and noise was not substantial and for that reason alone the case should be remanded.[1]

1. The majority's description of the evidence offered by proponents and opponents is incomplete. With respect to traffic, in addition to the evidence summarized in the majority's opinion, petitioner presented detailed testimony that the school presently requires 30 cars a day to transport 102 students plus five cars for staff and that this is far less than is required for normal church activities. With respect to noise, petitioner presented testimony showing the rural and sparsely populated nature of the neighborhood, the location of play fields with respect to nearby residences, and the testimony of immediate neighbors concerning the effect upon them. Considering the abstract nature of that which had to be proved, i.e. impact on noise and traffic, and that petitioner in effect had the burden of proving a negative, I would hold that proponents' evidence was substantial. By similar reasoning, I would hold that proponents' evidence concerning noise was substantial. However, the only evidence offered by proponents concerning traffic related in great part to times when school is not in session and was not substantial evidence. The one witness for the opponents on the traffic issue stated:

"I would like to talk about traffic and the noise. • • •

The majority does not state whether or not there was substantial evidence of adverse impact caused by sewage disposal. It is questionable whether the evidence offered by opponents was substantial, since opponents' evidence consisted solely of the testimony of lay persons who had no personal knowledge of the petitioner's property or drain field. The evidence offered by petitioner was substantial, particularly the report of the soil scientist. But, even if the opponents' evidence would qualify as substantial evidence, such evidence is not sufficient to support the Board's ultimate finding of "adverse affect on the surrounding property." The Board's finding of adverse effect on the surrounding property was stated in the conjunctive with respect to "traffic, noise and sewage disposal problems." There was not substantial evidence of adverse impact caused by traffic. Thus, one of the legs of the three-legged stool of the Board's findings has failed. There is no indication in the record that the Board would have denied the conditional use permit on grounds of sewage disposal problems alone.

It should also be noted that the written findings concerning noise, traffic and sewage were added as an afterthought. The record indicates that the controlling consideration motivating the county's decision was its errone-

---

1. (Cont'd.)

I see the traffic every day. The traffic starts about 8:30 in the morning and seems to continue until *late at night*. They have activities in the buildings *seven days* a week. There is only one access road to the church and that's Rust Way, that is our only access road to our neighborhood and to our homes. More often than not the cars coming from the church parking lot do not stop before entering Rust Way. I have seen cars traveling down Rust Way having to stop to allow a car to come from the parking lot. I worry about the safety of my two children. If they would want to ride a bicycle up to visit a friend I feel like I always need to walk them up the street because I am afraid they will be hit by a car." (Emphasis supplied.)

ous conclusion that the proposed use was contrary to the comprehensive plan. At the conclusion of the hearing the Board of County Commissioners voted two to one to deny the permit, Commissioner Telford dissenting. In voting for the permit, Commissioner Schumacher stated his reasons:

> "Ladies and Gentlemen, I think Counsel would agree that the burning issue in this matter is whether or not this application fits within the Comprehensive Plan because a conditional use must both fit the Comprehensive Plan and not be detrimental to the surrounding properties.
>
> " ° ° °
>
> " ° ° ° [T]he application must stand or fall, obviously, on whether or not it falls within the Comprehensive Plan and in my judgment it does not.
>
> "So, Mr. Chairman, I really have no choice other than to move that the appeal of a conditional use by the Damascus Community Church be denied on the basis that the conditional use does not conform to the Clackamas County Comprehensive Plan."

Commissioner Skoko stated his reasons:

> "My main concern is that we are compelled to abide by the Comprehensive Plan and checking in between breaks, it is my feeling that the zoning prevails here in accordance with the Plan and as a result I cannot go in any other direction except to so comply and I also do feel it's a violation of zoning which at a later time would be a violation of the Comprehensive Plan if the request was granted."

It is thus not at all clear whether the county would have ever denied the conditional use permit on the grounds of noise, traffic and sewage problems alone. The conflict between the written order and the statements of the reasons given at the time of the decision should be resolved.

APPENDIX C

CIRCUIT COURT OF OREGON
FIFTH JUDICIAL DISTRICT
OREGON CITY, OREGON 97045

CHARLES A. SAMS
CIRCUIT JUDGE

June 29, 1979

B. Rupert Koblegarde
Attorney at Law
310 Mayer Building
Portland, OR 97205

Ms. Beth Blount
Assistant County Counsel
906 Main Street
Oregon City, OR 97045

Re: Damascus Community Church v.
Clackamas County
No. 78-10-182

Dear Ms. Blount and Mr. Koblegarde:

The captioned case was heard on January 18, 1979, and then taken under advisement while counsel provided trial memorandum. The Court has studied those memoranda and read the applicable case law concerning this controversy.

Plaintiff seeks judgment, in their first claim for relief, declaring that the Plaintiff's original and current conditional use permit is sufficient to encompass its school operation.

There are no Oregon cases exactly on point with the instant case, although both counsel cited some Oregon cases and other jurisdiction cases to support their contentions.

The Court will not discuss each of those cited cases to distinguish them from the instant case. However, a 1978 New Hampshire case, *City of Concord v. New Testament Baptist Church*, 382 A2d 377 (1978) is on point with the instant case. The issue in that zoning case was whether a five-day per week school run by a fundamentalist church to provide education in lieu of public school for grades Kindergarten through 12th grade was a facility "usually connected with a church." The Supreme Court of New Hampshire held that it was.

The beliefs of the members of the New Testament Baptist Church required as a convictional matter that their children receive a Bible-oriented education every day of the week and not just on Sundays. Accordingly, the Heritage Christian School, as part of the ministry of the church, adopted the Accelerated Christian Curriculum and provided education in lieu of public school for the children of the congregation.

The Court held that the school would be considered as an integral and inseparable part of the church and therefore, was the proper permitted use connected with, and as a part of, the New Testament Baptist Church.

The instant case is exactly in point. Plaintiff's witnesses, who are members of the Damascus Community Church and have children who attend the school, testified they did not want their children educated in public schools because secular values taught in such schools violated their Christian values and religious convictions. The Damascus Community Church also uses the Accelerated Christian Curriculum (Plaintiff's Exhibits 4, 5, 6, and 7). Those respective exhibits are books used in the school to teach English, Science, Math and Social Studies. Although those exhibits teach the basic subjects, they are interwoven with

quotes from the Bible and analogies from both the Old and New Testaments of the Bible.

Therefore, this Court holds that the Damascus Community Church School is an integral and inseparable part of the Damascus Community Church and further declares that Plaintiff's original and current conditional use permit is sufficient to encompass its school operation.

The above decision obviates the requirements of reaching the Constitutional issues.

Plaintiff to prepare a judgment order accordingly.

Very truly yours,

/s/ CHARLES A. SAMS
Charles A. Sams, Judge

CAS:ko

APPENDIX D

February 24, 1976

Damascus Community Church
14251 S.E. Rust Way
Boring, Oregon 97009

RE: File No. CU-2-76

Gentlemen:

This is to advise you that at the regular meeting of the County Planning Commission, Monday, February 23, 1976, your application for a Conditional Use Permit to allow the Damascus Community Church to use their existing and future structures, for the private school consisting of a preschool and kindergarten classes and grade school classes one through twelve, on property described as Tax Lot 700, Section 4CD, T2S, R3E, was presented and carefully studied.

The Commission considered all the facts and evidence presented at the meeting and subsequently voted to deny your request based on the following:

1. The request is not in conformance with the Comprehensive Plan as the site is only ½ of the site requirements for schools.
2. Evidence has not shown that it will not be detrimental to the neighborhood.

Pursuant to the Clackamas County Zoning Ordinance, a Conditional Use Application denied by the Planning Commission may be appealed to the governing body of the

County within fifteen (15) days of the date of such denial, and shall be in writing and filed with the Planning Department. The appeal deadline is March 9, 1976. Enclosed are the necessary forms for filing an appeal. The fee for filing an appeal is ½ of the original application fee. If you have any questions concerning this matter, please feel free to contact this office.

Sincerely yours,

GUSTAVO M. RIVERA
Planning Director

RONALD STANGEL
Zoning Administrator

RS:bf
cc: Board of County Commissioners

APPENDIX E

BEFORE THE
BOARD OF COUNTY COMMISSIONERS
OF CLACKAMAS COUNTY, STATE OF OREGON

In the matter of the Appeal of the Conditional Use application of DAMASCUS COMMUNITY CHURCH having been denied by the Planning Commission to allow the Damascus Community Church to use their existing and future structures for the pre-school and kindergarten classes and grade school classes one through twelve, on property located on the NW corner of the intersection of State Highway 212 and Rust Way; Damascus Area

Appellant: DAMASCUS COMMUNITY CHURCH
(CU-2-76 X AP-14-76)

Order No. 76-535

This matter coming regularly before the Board of County Commissioners to be heard, and it appearing to the Board that Damascus Community Church made application to the Clackamas County Planning Commission for a Conditional Use Permit to allow the use of their existing and future structures for the private school consisting of a pre-school and kindergarten classes and grade school classes, one through twelve, on property described as Tax Lot 700, Section 4CD, T2S R3E, W.M. and Tax Lot 1602, Section 4, T2S, R3E, W.M.; and

It further appearing to the Board that said application was heard at a scheduled meeting of the Clackamas County Planning Commission on the 23rd day of February, 1976,

at which time the Planning Commission made a motion to deny the request; and

It further appearing to the Board that subsequent to said meeting, Damascus Community Church, did, on the 9th day of March, 1976, file an appeal of the Planning Commission's decision; and

It further appearing to the Board that pursuant to the provisions of the Clackamas County Zoning Ordinance, the Board of County Commissioners ordered a hearing on the above matter to be held on the 19th day of April, 1976, at the hour of 10:00 a.m., Room 201, Clackamas County Courthouse, Oregon City, Oregon, to afford the applicant and the general public an opportunity to be heard on the above appeal, and that a notice of said hearing was published in a newspaper of general circulation in the County at least ten (10) days prior to the date of said hearing; and

It further appearing to the Board that a hearing was held on the 19th day of April, 1976, at the hour of 10:00 a.m., Room 201, Courthouse Oregon City, Oregon, at which time testimony and evidence was presented on this matter.

Based upon the evidence presented at said hearing this Board finds as follows:

1. The proposed use of the subject property as a school for pre-school, kindergarten and grades one through twelve, with an ultimate enrollment of 250 students, is in conflict with the Clackamas County Comprehensive Plan in that said Plan would require a minimum of 12½ usable acres for such a school.

2. Applicant has failed to carry his burden of proving that the proposed use will not adversely affect the surrounding neighborhood, particularly with respect to traffic, noise and sewage disposal problems.

NOW THEREFORE, IT IS ORDERED that the appeal of Damascus Community Church of the Clackamas County Planning Commission's denial of the request for a conditional use permit to Damascus Community Church on the above-stated property is denied.

DATED this 6th day of May, 1976.

(Name illegible)
Chairman

(Name illegible)
Commissioner

BCC
Commissioner

1) No testimony was given during the hearing that the sewage disposal system had ever failed on this property. 2) I am not convinced that 12½ usable acres are required for a Church School. Requested a DA's opinion prior to determining this matter.

This request was overruled.

/s/ THOMAS D. TELFORD
Thomas, D. Telford, Commissioner

APPENDIX F

IN THE
CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

No. 96891

DAMASCUS COMMUNITY CHURCH,
Petitioner,

v.

CLACKAMAS COUNTY BOARD OF COMMISSIONERS,
Respondents.

Order

This matter coming on regularly on the 10th day of November, 1976, to be heard before the Honorable Howard J. Blanding, Petitioner appearing by and through B. Rupert Koblegarde, Respondents appearing by Keith Kinsman, Deputy District Attorney, this being the time set for rehearing on Writ of Review ordered by the Clerk of this Court June 4, 1976, the Court having reviewed the record and briefs of the parties in this matter, arguments being heard on behalf of each party, and the Court being fully advised;

THIS COURT FINDS that the Order of the Board of County Commissioners being reviewed is supported by

reliable, probative and substantial evidence, and specifically as follows:

(1) The finding that the Comprehensive Plan of Clackamas County requires a minimum of 12½ usable acres for the purposed use is a reasonable and proper interpretation of the Plan; and

(2) Reliable, probative and substantial evidence exists in the record supporting the finding that petitioner failed to carry his burden of proof at the hearing before the Board of County Commissioners.

IT IS THEREFORE ORDERED that the decision and determination of the Board of County Commissioners being reviewed is affirmed.

/s/ HOWARD J. BLANDING
Howard J. Blanding, *Judge*

DATED: November 12, 1976

APPENDIX G

SUPREME COURT — COURT OF APPEALS

February 24, 1978

LOREN D. HICKS
State Court Administrator

Supreme Court Building
Salem, Oregon 97310

Telephone Area Code—503

Case Records 378-6005
Legal Counsel 378-6022
Administrator 378-6046

B. Rupert Koblegarde
Attorney at Law
1130 SW Morrison Street
Suite 310
Portland, OR 97205

William B. Ball
Attorney at Law
P. O. Box 1108
Harrisburg, Pennsylvania 17108

Re: Damascus Community Church v. Clackamas County Brd of Commissioners CA 7349

Gentlemen:

Pursuant to Rule of Procedure 10.10 the Court of Appeals has considered the Petition for Review filed in the above case and has on February 24, 1978, decided not to rehear the matter or change its decision. Therefore, the Supreme Court will proceed to determine whether to

grant review. No mandate can issue until the Supreme Court has completed its review of the petition.

Yours very truly,

CJ
Carol Justis
Records Administrator

CJ/klb
cc: Keith J. Kinsman
Gregory Mowe

APPENDIX H

SUPREME COURT — COURT OF APPEALS

ELIZABETH D. BELSHAW
State Court Administrator
378-6046

Telephone Area Code—503

Re Cases on Appeal 378-6005
Legal Counsel 378-6022
Oreg. Reports Editor 378-2802

ADMINISTRATIVE OFFICE
SUPREME COURT BLDG.
SALEM, OREGON 97310

September 5, 1980

B. Rupert Koblegarde
Attorney at Law
1130 S. W. Morrison Suite 310
Portland, OR 97205

William B. Ball
Attorney at Law
P. O. Box 1108
Harrisburg, PA 17108

Re: Damascus Community Church v. Clackamas Co.
CA 15205 SC 27066

Dear Counsel:

The Supreme Court on September 3, 1980, denied Respondent's Petition for Review in the above-entitled matter.

Very truly yours,

MARILYN HARTLEY
Marilyn Hartley
Supreme Court Calendar Clerk

MH/vr
cc: Beth Blount

APPENDIX I

STATE OF OREGON
COURT OF APPEALS

No. 78-10-182
CA 15205

DAMASCUS COMMUNITY CHURCH,
Respondent,

v.

CLACKAMAS COUNTY, a political subdivision of the State of Oregon,
Appellant.

APPEAL FROM CLACKAMAS COUNTY CIRCUIT COURT

Judgment and Mandate

This cause having come on to be heard on appeal and having been duly submitted and considered and the Supreme Court having denied review on September 3, 1980;

IT IS HEREBY ADJUDGED and ORDERED that the decision entered below is reversed and the cause remanded to said court for further proceedings pursuant to law and this Court's decision and opinion herein rendered April 28, 1980.

IT IS FURTHER ORDERED that appellant recover from respondent costs and disbursements in this court in the amount of $162.59.

ISSUED at Salem, Oregon:

STATE OF OREGON,
County of Marion.

I, LOREN D. HICKS, State Court Administrator for the State of Oregon, do certify that this copy of ORDER is a correct transcript of the original, which is on file in my office.

IN TESTIMONY WHEREOF, I have affixed the seal of the Court at Salem, Oregon, this ————————.

LOREN D. HICKS
State Court Administrator

APPENDIX J

IN THE COURT OF APPEALS OF THE STATE OF OREGON

No. 78-10-182
CA 15205

DAMASCUS COMMUNITY CHURCH,
Appellant,

v.

CLACKAMAS COUNTY, a political subdivision of the State of Oregon,
Appellee.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Damascus Community Church, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Oregon, denying Appellant's petition for review of the decision of the Court of Appeals of the State of Oregon, entered in this action on September 3, 1980.

This appeal is taken pursuant to 28 U. S. C. § 1257(2).

/s/ B R KOBLEGARDE
B. Rupert Koblegarde,
Counsel for Appellant,
OSB No. 70079

APPENDIX K

"CONDITIONAL USES

"8.1 GENERAL PROVISIONS

"A . . . The following conditional uses, because of their public convenience and necessity and their effect upon the neighborhood shall be permitted only upon the approval of the Hearings Officer after due notice and public hearing, * * * and a finding that such conditional use will not be detrimental to the general comprehensive plan and surrounding property.

"B . . . Permits for conditional uses shall stipulate restrictions or conditions which may include a definite time limit, provisions for a front, side or rear yard greater than the minimum dimensional standards of the Zoning Ordinance, suitable landscaping, off-street parking, and any other reasonable restriction, condition, or safeguard that would uphold the spirit and intent of the Zoning Ordinance, and mitigate any adverse effect upon the neighborhood properties by reason of the use, extension, construction or alteration allowed.

"C . . . Any conditional use shall meet the dimensional standards of the Zone in which it is to be located, as well as the minimum conditions listed below.

"* * *

"8.4 CHURCHES

"A . . . District Permitted: Residential, Multi-Family, Agricultural, and Commercial Districts.

"B . . . Conditional Standards.

"* * *

"C . . . Off-street Parking: As provided in Section 7.1.

"* * *

"8.8 SCHOOLS: PAROCHIAL AND PRIVATE

"A . . . District Permitted: Agricultural, Residential, and Multi-Family Districts.

"B . . . Dimensional Standards:

"* * *

"C . . . Off-Street Parking: As required in Section 7.1.

"D . . . Off-Street Loading and Unloading Area for Buses: As required in Section 7.2.

"* * *

"8.12 PUBLIC SCHOOLS: PRIVATE AND PAROCHIAL SCHOOLS OFFERING CURRICULA SIMILAR TO PUBLIC SCHOOLS.

"A . . . District Permitted: Single-family Residential, Agricultural, and the MR-1 Multi-Family District.

"B . . . Dimensional Standards:

"C . . . Off-Street Parking: As required in Section 7.1.

"D . . . Off-Street Loading and Unloading Area for Buses: As required in Section 7.2."

Supreme Court, U.S.
FILED
JAN 8 1981
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-906

DAMASCUS COMMUNITY CHURCH,

Appellant,

v.

CLACKAMAS COUNTY, a Political Subdivision of the State of Oregon,

Appellee.

On Appeal from the
COURT OF APPEALS OF THE STATE OF OREGON

MOTION TO DISMISS

SCOTT H. PARKER
JOHN E. SCHWAB
CLACKAMAS COUNTY COUNSEL
906 Main Street
Oregon City, OR 97045
(503) 655-8362
Attorneys for Appellee

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-906

DAMASCUS COMMUNITY CHURCH,

Appellant.

v.

CLACKAMAS COUNTY, a Political Subdivision of the State of Oregon,

Appellee.

On Appeal from the
COURT OF APPEALS OF THE STATE OF OREGON

MOTION TO DISMISS

The Appellee moves the Court for an order dismissing the appeal herein on the ground that it is manifest that the decision of the Oregon Court of Appeals is correct and that no substantial federal question is presented by this appeal.

I

STATEMENT OF THE CASE

On or about December 18, 1967, the Clackamas County Planning Commission issued to the Damascus Community Church a conditional use permit to construct a church on property it owns in Boring, Oregon. The property is zoned RA-1, Rural (Agricultural) Single Family Residential; churches and schools are separately listed as conditional uses in that district. Jurisdictional Statement, App. K, p. A40-41. In 1975, the County learned that Appellant was operating a school on the subject property without the necessary conditional use permit. After investigation, the County Planning Director notified Appellant that its use of its property for a school violated the terms of the zoning ordinance and requested that Appellant discontinue that use or apply for a conditional use permit for the school. Appellant then applied for a permit which would have accommodated considerable future student body growth and construction of new buildings. Appellee's Board of County Commissioners denied that permit application and was ultimately upheld by the Oregon Court of Appeals. Jurisdictional Statement, App. B. Subsequently, the County filed suit to enjoin the operation of the school without the necessary permit and Appellant countered with a suit for declaratory judgment, seeking a ruling that the operation of the school was included in the 1967 permit for the church, or alternatively, that enforcement of the zoning ordinance was unconstitutional.

The trial court did not rule on the merits of the County's suit for an injunction, but rather, held in its declaratory judgment order that the school ". . .is an integral and

inseparable part of the Damascus Community Church and, further, that Damascus Community Church's original and current conditional use permit is sufficient to encompass school operation." Jurisdictional Statement, App. C, p. A26. The Oregon Court of Appeals reversed the trial court, holding that the Clackamas County Zoning Ordinance provided separate criteria for placement of churches and schools in certain zones by permit and that the use of Appellant's property for a school is not automatically authorized by a permit allowing its use for a church. Further, the Court held that the ordinance and its application to Appellant's situation does not interfere with Appellant's right to the free exercise of religion since the zoning regulations only impose reasonable limitations upon religious practices and not upon religious beliefs, and that those limitations are designed to protect the public health and welfare. Jurisdictional Statement, App. A, p. A9. On September 3, 1980, the Oregon Supreme Court denied Appellant's petition for review (Jurisdictional Statement, App. H, p. A36), and this appeal follows.

II

ARGUMENT

1. The zoning regulations at issue here are reasonable limitations on the place and manner of practice of Appellant's religious beliefs.

The Appellant contends the zoning ordinance prohibits the church from operating its school without justifying that prohibition by a showing of compelling state interest. That contention fails to raise a substantial federal question.

The compelling state interest test provides that governmental interference with First Amendment freedoms can only be upheld by a showing of compelling reasons justifying the interference. That test has not been applied to reasonable and necessary regulation of religious practices. The zoning ordinance provisions at issue here, and the County's enforcement of those provisions in this situation, are necessary to protect the public's welfare and comprise reasonable governmental regulation of the manner in which Appellant practices its religious beliefs and are not subject to a showing of compelling state interest.

The Court has held the First Amendment prohibits governmental infringement upon religious beliefs. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900 (1940). However, the Court has long recognized a distinction between governmental interference with religious beliefs and reasonable regulation of the practice of those beliefs. Reynolds v. United States, 98 U.S. 145 (1879). Even while invalidating a statute affecting freedom of religion, a unanimous court in Cantwell said:

> "No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guarantee. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace,

> good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment." Cantwell v. Connecticut, supra, 60 S.Ct. at 903.

The Appellant relies heavily on Sherbert v. Verner, 374 U.S. 398, 83 S.Ct. 790 (1963), for the proposition that, ". . .the finding of a compelling state interest is requisite to the sustaining of any form of governmental regulation which impinges on the free exercise of religion." Jurisdictional Statement, p. 5. The actual holding in that case is somewhat more narrow. In Sherbert, the Appellant was denied unemployment compensation benefits because she refused to accept suitable work when offered. Her refusal was based on her conscientious objection to work on Saturday, the Sabbath Day of her faith. Speaking for a majority of the Court, Mr. Justice Brennan was careful to note that the statutes at issue directly infringed upon the appellant's religious beliefs, and not upon conduct prompted by those beliefs. Sherbert v. Verner, supra, 83 S.Ct. at 1793. It was that direct infringement that the Court held subject to the compelling state interest test.

This Court has never dealt with whether zoning regulations such as the conditional use permit process at issue here are permissible limitations on the manner of the exercise of First Amentment freedoms. The Oregon Supreme Court directly confronted the issue in Jehovah's Witnesses v. Mullen, 214 Or 281, 330 P2d 5 (1958), appeal dismissed, 359 U.S. 436 (1959). In that case, the defendant City Council had denied a permit authorizing construction of a church in a residential zone on the grounds that the proposed

church would create a traffic hazard and congestion in the neighborhood. The plaintiff religious corporation filed for a writ of mandamus, contending, among other things, that the denial was a violation of the Free Exercise Clause. The Oregon Court, relying on Cantwell v. Connecticut, supra; and on Corporation of Presiding Bishop v. City of Porterville, 90 Cal. App. 2d 656, 203 P2d 823 (1949), dismissed for want of substantial Federal question, 338 U.S. 805, 70 S.Ct. 78, reh. den., 338 U.S. 939, 70 S.Ct. 342 (1950), held that zoning regulations are among the reasonable limitations on the time, place and manner of religious practice that government has the inherent police power to impose to protect the public health or welfare.

More recently, the Oregon Court of Appeals upheld the local denial of a religious corporation's application for a conditional use permit to build a "retreat center" in a single-family residential district. Christian Retreat Center v. Washington County, 28 Or App 673, 560 P2d 1100 (1977), rev. den., 278 Or 553 (1977). The defendant County Commission found the contemplated use would result in an unacceptable increase in noise and traffic in the area, that the site was too small for the proposed use, and that the "retreat center" would not fulfill the public need for which the "church and accessory uses" designation had been incorporated into the zoning ordinance. On appeal, the Court held the grounds for denial were reasonable limitations upon the religious practices of the religious corporation.

The zoning regulations at issue here are reasonable limitations on the use of Appellant's property and on the practice of Appellant's religious beliefs. Section 1.11 of the Clackamas

County, Oregon Zoning Ordinance, at all times material to this dispute, read as follows:

> "This Ordinance is enacted for the purpose of promoting public health, safety, morals, comfort and general welfare; to conserve, stabilize, and to protect property values; to encourage the most appropriate uses of land; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to lessen traffic congestion, and to facilitate adequate and economical provisions for public improvements, all in accordance with a development plan for the future development of the County, or parts thereof; to provide a method of administration and to prescribe penalties for the violations of provisions hereafter described -- all as authoirzed by the provisions of Sections 215.010 to 215.190, and Section 215.990, Oregon Revised Statutes, and subsequent amendments."

To further those goals, Clackamas County has determined that certain land uses, because of their public convenience and necessity and their effect upon surrounding neighborhoods, should not be outrightly allowed in all zones but should undergo the public hearing process that leads up to a conditional use permit. Among those conditional uses are churches and schools.

Different uses of a single structure may have radically different impacts upon the surrounding neighborhood. A school is a more intense use of Appellant's premises than a church.

Such a use generates more traffic, more noise from playgrounds, and more sewage. The County's enforcement of its zoning ordinance does not operate to deny church members their religious beliefs, but may prevent overuse of the church property in the practice of those beliefs.

The Appellant has never applied for a permit to use its property for the operation of a school in existing buildings and at its current level of enrollment. The proper standards required for this use have never been applied. The Appellant has not shown that the ordinance would operate to preclude the operation of the school at a more acceptable site. The Appellant has not alleged that the County has acted in an arbitrary or capricious manner or has discriminated against the Appellant when compared to other religious organizations or other applicants for conditional use permits. Indeed, to exempt religious organizations from the land use compatibility analysis required of other applicants would favor religious uses of land over secular uses and might, in itself, be in derogation of the Establishment Clause.

The Clackamas County, Oregon Zoning Ordinance and its application to Appellant's property do not unconstitutionally infringe upon the free exercise of Appellant's religious beliefs. The issue raised by Appellant does not state a substantial federal question and this appeal should be dismissed.

2. <u>The separate classification in a zoning ordinance of churches and schools is not "suspect" and is not subject to "strict scrutiny."</u>

Classification is inherent in all zoning. Logic dictates that churches, which normally draw

heavy use on one or two days of the week, merit a land use analysis different from schools. A school is a more intense use of property than a church. Schools generate traffic and noise at least five days a week. Schools require more space. Schools generate more sewage.

The Clackamas County, Oregon Zoning Ordinance draws distinctions among "Churches," "Schools: Parochial and Private," and "Public Schools: Private and Parochial Schools Offering Curricula Similar to Public Schools," and lists them separately as conditional uses in certain zoning districts. The ordinance also separately lists as conditional uses auto wrecking yards, cemeteries, nursing homes, mobile home parks, hospitals, drive-in theaters, and several other special purpose land uses.

Statutes create many classifications which do not deny equal protection; it is only invidious discrimination which offends the Federal constitution. American Party of Texas v. White, 415 U.S. 767, 94 S.Ct. 1296, reh. den., 416 U.S. 1000, 94 S.Ct. 2414 (1974). Appellant's Jurisdictional Statement cites no authority for the proposition that the zoning regulations at issue here create "suspect classifications." The Appellant has not shown that the zoning regulations at issue here have been applied arbitrarily to its property or that the distinction between churches and schools results in some invidious discrimination. The Court held long ago in Village of Euclid v. Ambler Realty Company, 272 U.S. 365, 47 S.Ct. 114 (1926), that zoning regulations bear a rational relationship to permissible state objectives.

The Clackamas County, Oregon Zoning Ordinance and its application to Appellant's property are reasonable, necessary and do not violate the Equal Protection Clause. The issue raised by Appellant does not state a substantial federal question, and this appeal should be dismissed.

Respectfully submitted,

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